QUESTION PRESENTED

Whether Nevada Supreme Court Rule 177, governing extrajudicial statements by lawyers about pending cases, is constitutional under the First Amendment, on its face and as applied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1836

DOMINIC P. GENTILE,
Petitioner

v.

STATE BAR OF NEVADA,
Respondent

On Writ of Certiorari to the Supreme Court of Nevada

BRIEF FOR THE RESPONDENT

STATEMENT

On May 12, 1989, after an evidentiary hearing, the Southern Nevada Disciplinary Board of the State of Nevada (the "Board") recommended that petitioner, an attorney, be privately reprimanded for statements he made at a press conference about a pending criminal case in which he was counsel for the defendant (J.A. 2-5). The Board concluded that petitioner had violated Nevada Supreme Court Rule 177 ("Rule 177")[1] by commenting on the character, credibility, reputation, and criminal rec-

[1] Rule 177 is reprinted in full in Appendix A.

ords of prospective witnesses and by giving his opinion on the guilt or innocence of his client (*id.* at 5). On appeal, the Nevada Supreme Court affirmed the recommendation, finding that it was supported by clear and convincing evidence (Pet. App. 1a-5a). The court rejected petitioner's constitutional challenges to Rule 177 (*id.* at 4a).

1. In late 1987, petitioner was retained to represent a criminal defendant, Grady Sanders, on allegations relating to the theft of a large quantity of cocaine and travellers checks from a safe deposit box located at a secure storage facility owned by Sanders. The Las Vegas Police Department had been using the safe deposit box in connection with an undercover investigation. J.A. 2; Pet. App. 2a.

On February 4, 1988, Sanders was indicted by a Clark County, Nevada grand jury on eleven counts of grand larceny, trafficking in narcotics, and racketeering (J.A. 100-103, 127-29). The next day, the date of Sanders' arraignment, petitioner called a press conference (*id.* at 2). During that press conference, which was attended by electronic and print media (*id.*), he commented about a variety of matters relating to the Sanders case (*id.* at 100-103, 127-29).[2]

Specifically, petitioner expressed his personal opinion that Sanders was innocent of the charges. He noted that "I know I represent an innocent man" and that "I don't take cheap shots like this. I represent an innocent guy." Pet. App. 12a. He also stated that Sanders did not take a police polygraph test, adding, "I don't have much faith in polygraph tests" (*id.* at 13a).

Petitioner also offered his opinion that the perpetrator was actually a member of the Las Vegas Police Depart-

[2] The full text of the news conference appears at Pet. App. 8a-15a. A videotape of the news conference was introduced at the disciplinary hearing (J.A. 11-12, 16).

ment, Detective Steve Scholl. He noted that Scholl was "the person that was in the most direct position to have stolen the drugs and the money, the American Express Travelers' checks" (Pet. App. at 8a). According to petitioner, "[t]here is far more evidence that will establish that Detective Scholl took these drugs and took these American Express Travelers' checks than any other living human being" (*id.*). In an apparent effort to suggest that Scholl was a drug user, petitioner stated: "We've got some videotape that if you take a look at them, I'll tell you what, he [Steve Scholl] either had a hell of a cold or he should have seen a better doctor" (*id.* at 14a).[3]

Along these same lines, petitioner referred to the prosecution of Sanders as a "scam" (Pet. App. 10a) and stated: "I feel that Grady Sanders is being used as a scapegoat to try to cover up for what has to be obvious to people at the Las Vegas Metropolitan Police Department and at the District Attorney's office" (*id.* at 8a). He observed that "[t]he day [the police] opened a security box . . . they had a built-in scapegoat for ripping off anything they wanted" (*id.* at 10a).[4]

Petitioner also commented on the credibility of various prospective prosecution witnesses in addition to Scholl. He noted that "the so-called other victims, . . . one, two—four of them are known drug dealers and convicted money launderers and drug dealers" (Pet. App. 8a). He added that three of them "didn't say a word about anything until after they were approached by [the Las Vegas Police Department] and after they were already in trouble and [were] trying to work themselves out of some-

[3] Petitioner concedes that he "strongly implied that Detective Scholl had used cocaine in an earlier undercover operation" (Pet. Br. 9).

[4] *See also* Pet. App. 13a ("They knew they had a natural scapegoat. He was there. He was built-in. You couldn't ask for a better situation."); *id.* at 10a ("I think Grady Sanders was indicted because he—he was a scapegoat the day they opened the box.").

thing" (*id.* at 8a). He also pointed out that until these victims "started going along with what Detectives from [the Las Vegas Police Department] wanted them to say, these people were being held out as being incredible and liars by the very same people who are going to say now that you can believe them" (*id.* at 8a-9a).

With respect to the stolen cocaine that was at issue, petitioner observed that the press would learn through the proceedings "that the cops gave some of the cocaine away, which is totally unheard of, but gave away cocaine samples to people that they were trying to set up" (Pet. App. 13a). He added, "I can tell you of at least two events and maybe as much as 10 grams at a time. That's no small amount." *Id.* In response to a question about whether the stolen cocaine was used or sold by the thief, petitioner responded: "That's a lot of cocaine to use, isn't it? I don't know the answer to that. If I speculate, I'd have to say sold it." *Id.* at 14a.

2. On March 8, 1988, Justice Cliff Young of the Nevada Supreme Court sent two news articles describing the press conference to the State Bar of Nevada (the "Bar") and requested that the matter be referred to Bar Counsel for a determination of whether petitioner had violated the court's Rules of Professional Conduct (J.A. 83). On December 6, 1988, following the conclusion of the Sanders trial,[5] the Bar filed a formal complaint against petitioner alleging that the statements at his February 5, 1988 press conference violated Rule 177 (*id.* at 4).

3. On April 17, 1989, the Board held an evidentiary hearing on the Bar's complaint. At the hearing, the Bar relied primarily on a videotape of the press conference (*see* J.A. 11-12, 16). Petitioner testified on his own behalf. He indicated that the press conference at issue was the first time he had "ever set[] a time and place and call[ed] the media to that place at that time" (J.A. 42). He selected the date for the press conference—the date of Sanders' arraignment—because he "knew that once [the indictment] became public knowledge . . . the media was going to be all over the courtroom" (*id.* at 43).

[5] On August 26, 1988, Grady Sanders was acquitted of all charges (Rec. on App., Gentile Ex. A to Disciplinary Hearing, August 27, 1988 press coverage; Pet. App. 2a).

Petitioner stated that the night before the press conference, he and two other attorneys had researched the issue of what an attorney could properly say to the press about a pending case (J.A. 43). Based on that research, petitioner testified that he knew that he was not permitted to "go count by count and talk about the specific credibility of each individual witness" and could not "talk about things that are not admissible in evidence" (*id.* at 44-45). He told the hearing panel that, based on his research, he did not think that he had done anything improper at the press conference (*id.* at 45).

In the same testimony, petitioner admitted commenting on the character of Detective Scholl (J.A. 50), and stated that he knew when he gave the press conference that the police detectives and many of the victims whose character he had attacked would be government witnesses (*id.* at 49). Petitioner denied that he had done anything wrong in referring generally to other victims of the theft as known drug dealers, convicted money launderers, and convicted drug dealers (*id.* at 52). He explained that his principal reason for holding the press conference was to "fight back," since "improper methods" were "used by . . . the prosecutor and the police to poison a perspective [sic] juror venire" (*id.* at 45). He noted in particular that there had been media reports that Scholl and another officer had passed polygraph tests (*id.* at 40-42). Primarily because of those media reports, petitioner believed that the press conference was "fair rebuttal given what [the prosecution] had started" (*id.* at 50).

In addition to testifying on his own behalf, petitioner offered testimony of four other witnesses—a newspaper editor and former criminal defense lawyer, another former criminal defense lawyer who served as in-house counsel to a television station, a former prosecutor, and the Federal Defender for Las Vegas. These witnesses all testified that, in their view, Nevada Supreme Court Rule 177 was unconstitutional (J.A. 18-34, 62-68, 68-74, 75-81). Indeed, each witness expressed the view that a defense attorney has an *obligation* to defend his client in the press (*id.* at 27-28, 65, 71-72, 76-77).

4. On May 12, 1989, the Board issued its Findings and Recommendations (J.A. 2-5), concluding that petitioner violated Rule 177 and thus should be privately reprimanded. The Board noted that on the day after his client's indictment, petitioner had called a press conference that was attended by both electronic and print media (*id.* at 2). After describing the press conference (*id.* at 2-3), the Board listed petitioner's admitted purposes for gathering the media: "(i) to counter public opinion which he perceived as adverse to Mr. Sanders, (ii) to attempt to refute certain matters regarding his client which had appeared in the media, (iii) to fight back against the perceived efforts of the prosecution to poison the prospective juror pool, and (iv) to publicly present Sanders' side of the case" (*id.* at 3-4). Furthermore, the Board noted that petitioner knew that Scholl would be a prosecution witness and believed that the "other victims" would be as well (*id.* at 3).

The Board concluded that petitioner's statements met all of the elements of Rule 177. Petitioner knew that his statements "would be disseminated by means of public communication"; those statements "related to the character, credibility, reputation and criminal record of witnesses in the [Sanders] trial"; they "contained an opinion of the guilt or innocence of Mr. Sanders"; and they "were known or should have been known by [petitioner]

to have a substantial likelihood of materially prejudicing the Sanders trial" (J.A. 5). The Board rejected petitioner's argument that Rule 177 was unconstitutional, as well as his claim that the Bar's conduct was inequitable or amounted to selective enforcement (*id.*). In light of petitioner's violation of Rule 177, the Board recommended that he be given a private reprimand (*id.*), the lowest level of discipline. *See* Nev. Sup. Ct. R. 102.6.

5. Applying the "clear and convincing evidence" standard because "a higher degree of proof is required in disciplinary matters than in ordinary civil matters" (Pet. App. 3a), the Nevada Supreme Court unanimously affirmed the Board (*id.* at 2a-5a).[6] Based on its independent review of the record,[7] the court found that "[a] reasonable attorney, especially after having researched the issue, should have known that his conduct was improper, particularly with respect to the comments regarding the police detective and other potential witnesses" (*id.* at 3a-4a). The court noted that, while petitioner's comments caused no actual prejudice to the outcome of the trial, they had posed a substantial likelihood of material prejudice (*id.*). It pointed out that "[t]he case was highly publicized, and the press conference was held the day after the grand jury indictment and the same day as the arraignment—a time when the intensity of public interest in a notorious case is at its peak" (*id.* at 4a). The court added that "[t]he fact that these comments were timed to have maximum impact and related to the character, credibility, reputation or criminal record of the

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[6] Justice Cliff Young, who had previously informed the Bar of petitioner's statements back in March of 1988 (J.A. 83), recused himself from the case (Pet. App. 5a n.1).

[7] The court noted that, while the Board's recommendations were "persuasive," they were "not binding" on the court, which was required to "review the record de novo and exercise independent judgment to determine whether and what type of discipline is warranted" (Pet. App. 3a (citations omitted)).

police detective and other potential witnesses establishes by clear and convincing evidence the substantial likelihood of material prejudice to the adjudication of [Sanders'] criminal proceeding" (*id.*). Finally, the court concluded that petitioner's constitutional challenges were without merit (*id.*).

SUMMARY OF ARGUMENT

I. Petitioner maintains that lawyers involved in pending cases should be treated the same for First Amendment purposes as the press and members of the general public. Thus, he argues, the proper legal standard is the "clear and present danger" rule of *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

Petitioner's position is contrary to the overwhelming weight of authority. This Court has repeatedly indicated that, as officers of the court, lawyers participating in judicial proceedings may be subject to speech restrictions that could not be imposed on the press.

The vast majority of lower courts have rejected petitioner's proposition that lawyers involved in pending cases should be treated the same as the press. Indeed, most courts have approved a "reasonable likelihood" of prejudice standard, which is less protective of First Amendment interests than the "substantial likelihood of material[] prejudic[e]" standard utilized in Rule 177.

In addition, petitioner's approach would render unconstitutional at least 43 states' disciplinary rules governing lawyers' extrajudicial statements. The rules in 31 states are the same, or virtually the same, as Nevada's rule, while the rule in 11 other states is a "reasonable likelihood" test that is less protective of First Amendment interests than Nevada's rule. The approach taken by other states on such matters is entitled to weight.

See, e.g., Butterworth v. Smith, 110 S. Ct. 1376, 1383 (1990).

The current approach to lawyers' extrajudicial statements is warranted by two important considerations. First, lawyers are "officers of the court." As such they are critical to the proper functioning of our judicial system, and must be held to exacting ethical standards. Second, lawyers participating in a case have special access to information, through discovery and client communications. For that reason, their extrajudicial statements pose a grave risk because such statements are likely to be viewed as especially authoritative.

Petitioner's *Nebraska Press* standard would permit virtually no regulation of attorneys' extrajudicial statements. Under that standard, as long as an unbiased jury can be secured through, *inter alia*, voir dire, a continuance, or a change of venue, attorney speech must be permitted. Thus, for example, under petitioner's standard, an attorney could, on the eve of trial, describe to the media evidence previously ruled *in limine* to be inadmissible. Because the court could almost certainly secure an unbiased jury by postponing the trial or ordering a change of venue, the attorney could not be disciplined. Indeed, petitioner's standard, if adopted, would raise serious constitutional questions about other settled restrictions on attorney speech, such as the attorney-client privilege.

Rule 177, which is patterned after Model Rule 3.6 of the American Bar Association's Model Rules of Professional Conduct, properly balances First Amendment concerns against the need to protect the fairness of the judicial system. Specifically, Rule 177 adopts an exacting "substantial likelihood of material[] prejudic[e]" standard. To assist lawyers in applying that standard, it sets out statements that ordinarily are likely to cause such prejudice in various types of proceedings. The Rule also

specifies information that a lawyer may state without elaboration. Because of its specificity and narrow scope, Rule 177 properly addresses First Amendment concerns and is neither vague nor overbroad.

Likewise, contrary to the contentions of petitioner and amici, Rule 177 does not prevent an attorney from vigorously representing his client. A defendent has no Sixth Amendment right to have his case tried in the press. If his opponent has made prejudicial comments to the press, the defendant's protection rests with voir dire, change of venue, jury instructions, and, in extreme cases, reversal on due process grounds.

Moreover, there is no merit in the claim by petitioner and certain of his amici that Rule 177 violates the public's First Amendment rights. The Rule imposes only limited restrictions on a small category of people—lawyers involved in pending cases. Rules such as Rule 177 have been in place for decades, and there is no evidence that such rules have impeded the ability of the press to report fully and fairly on judicial matters.

II. Finally, there is no merit in petitioner's claim that he was improperly singled out for discipline. The premise of his contention—that his extrajudicial statements were permissible under Rule 177—is simply incorrect. Petitioner violated the warnings of Rule 177 by giving his opinion on his client's innocence, by discussing polygraph-related evidence, and by commenting on the character, reputation, and criminal records of the government's witnesses. Indeed, petitioner admitted at the disciplinary hearing that his very purpose in calling the press conference was to "fight back," since he believed that the prosecution had "poison[ed] a perspective [sic] juror venire" (J.A. 45). There is no evidence that the enforcement of Rule 177 against petitioner was based on anything other than his serious violations of the Rule.

ARGUMENT

I. NEVADA SUPREME COURT RULE 177 SATISFIES THE FIRST AMENDMENT

This case calls upon the Court to balance the right of free speech against the need to control statements by attorneys that threaten the fairness of the judicial process. Petitioner and his amici [8] argue that lawyers involved in pending cases should be treated the same as the press and that lawyers' statements about such cases should be subject to virtually no regulation whatsoever. As we explain below, however, this suggestion contradicts decades of judicial decisions and disciplinary standards, which recognize the importance of controlling lawyers' comments about pending cases. It also ignores the important distinctions between the press and lawyers involved in pending cases.

In adopting Rule 177, Nevada properly balanced First Amendment and fair trial concerns. Rule 177, which is virtually identical to American Bar Association (ABA) Model Rule 3.6,[9] is a carefully crafted rule which pro-

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[8] Amicus briefs in support of petitioner were filed by the American Newspaper Publishers Association, *et al.* ("ANPA Br."), the American Civil Liberties Union ("ACLU Br."), the National Association of Criminal Defense Lawyers ("NACDL Br."), and the Nevada Attorneys for Criminal Justice ("NACJ Br.").

[9] On November 7, 1990, Rule 177.1 was amended (effective January 5, 1991) to add the following italicized language:

> *Notwithstanding the provisions of any contrary statute or rule,* a lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

The rest of Rule 177 was left unchanged. This change does not affect the substance of the Rule or affect any issue before the Court. It merely clarifies that an attorney cannot rely on another rule or statute as an excuse for violating Rule 177.

hibits extrajudicial statements by lawyers that "have a substantial likelihood of materially prejudicing an adjudicative proceeding." This standard reflects a sensitivity to free speech concerns, but it also takes into account the need to control statements by lawyers that threaten the fairness of the judicial system.

A. There Is Overwhelming Authority That Lawyers Participating in Judicial Proceedings May Be Subjected, Consistent With the First Amendment, to Speech Restrictions That Could Not Be Imposed on the Press or Members of the General Public

Petitioner argues that Rule 177 is unconstitutional because it does not incorporate the "clear and present danger" rule of *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), which is applicable to the press (Pet. Br. 29, 31). Under petitioner's proposed standard, extrajudicial statements by lawyers about pending cases cannot be prohibited unless there is clear proof that the statements "would so distort the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court." *Nebraska Press*, 427 U.S. at 569. This standard cannot be satisfied where alternative measures, such as voir dire, change of venue, or postponement of the trial, would protect the fairness of the trial. *Id.* at 563-64. As petitioner concedes (Pet. Br. 28), the *Nebraska Press* standard is virtually impossible to satisfy, and thus means as a practical matter that almost no lawyer speech about pending cases could be subject to regulation.[10] In taking this position, petitioner and amici virtually ignore the overwhelming consensus of the courts and state disciplinary rules that the *Nebraska Press* standard is inappropriate in the context of attorney speech about ongoing adjudicative proceedings.

[10] *See, e.g.*, Goodale, *The Press Ungagged: The Practical Effect on Gag Order Litigation of Nebraska Press Association v. Stuart*, 29 Stan. L. Rev. 497, 497-98 (1977) (noting that "the practical impact of the rule announced by [*Nebraska Press*] . . . is to outlaw all prior restraints in fair trial/free press cases").

According to petitioner, "no Justice has ever questioned the appropriateness of [the clear and present danger test] as the yardstick for measuring the harm caused by speech about pending litigation" (Pet. Br. 25 n.21). In fact, while this Court has not previously faced the precise issue involved here, it has made clear in a long line of cases that lawyers' extrajudicial statements about pending cases may be subject to substantial regulation. These statements by the Court—which petitioner and amici fail to discuss—simply cannot be reconciled with the *Nebraska Press* standard.

In *In re Sawyer*, 360 U.S. 622 (1959), five members of the Court directly addressed the constitutionality of regulating attorneys' extrajudicial statements about pending cases. The Court in *Sawyer* reviewed an order affirming the suspension of an attorney from practicing law for attacking the fairness and impartiality of a judge. The plurality opinion, which found the discipline to be improper, was limited to the factual question of whether the comments had in fact impugned the judge's integrity. *Id.* at 627.[11] Five members of the Court, however, went on to discuss First Amendment considerations. Justice Stewart, in a concurring opinion, refused to join any possible "intimation [in the plurality opinion] that a lawyer can invoke the constitutional right of free speech to immunize himself from even-handed discipline for proven unethical conduct." *Id.* at 646. According to Justice Stewart:

> A lawyer belongs to a profession with inherited standards of propriety and honor, which experience

[11] Because the case arose in the Territory of Hawaii, whose Supreme Court's decisions were subject to federal court review, the plurality noted that it was appropriate for the Court to resolve this factual issue. *See Sawyer*, 360 U.S. at 638-40.

> has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards. [¶] *Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech.*

Id. at 646-47 (emphasis added).

Similarly, Justice Frankfurter, joined in dissent by Justices Harlan, Clark, and Whittaker, addressed the unique First Amendment considerations governing lawyers in pending cases:

> Of course, a lawyer is a person and he too has a constitutional freedom of utterance and may exercise it to castigate courts and their administration of justice. But *a lawyer actively participating in a trial, particularly an emotionally charged criminal prosecution, is not merely a person and not even merely a lawyer. . . . He is an intimate and trusted and essential part of the machinery of justice, an "officer of the court" in the most compelling sense.*

Id. at 666-68 (emphasis added). Thus, the four dissenters concluded that a lawyer should not be "constitutionally entitled to remove his case from the court in which he is an officer to the public and press. . . ." *Id.* at 668.[12]

Subsequently, in *Sheppard v. Maxwell*, 384 U.S. 333 (1966), the Court echoed the strong sentiments of the *Sawyer* concurrence and dissent. In *Sheppard*, the Court held that the extensive pretrial publicity in the case had denied the defendant a fair trial. In reaching its decision, the Court explained that "the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged

[12] Notwithstanding the clear relevance of *Sawyer*, petitioner fails even to cite the case, as do three of petitioner's amici. Although the National Association of Criminal Defense Lawyers does cite *Sawyer*, it likewise fails to acknowledge the discussion of First Amendment issues by five members of the Court.

prejudicial matters. . . ." *Id.* at 361.[13] The Court concluded that, although a new trial should be ordered when pretrial publicity has threatened the trial's fairness:

> [W]e must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. *Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.*

Id. at 363 (emphasis added).

Ten years later, in *Nebraska Press*, the Court adopted a virtually insurmountable standard for restraining press coverage of a criminal trial. 427 U.S. at 569. *See* page 12, *supra*. As noted, this is precisely the standard urged by petitioner to govern lawyers' statements about pending cases. What petitioner fails to mention, however, is that the Court acknowledged the possibility that trial courts could take measures against sources other than the press to curtail prejudicial pretrial publicity. Citing the above-quoted discussion in *Sheppard*, the Court stated that it "has outlined other measures short of prior restraints on publication tending to blunt the impact of pretrial publicity." 427 U.S. at 564.[14]

[13] In support of this statement, the Court cited *State v. Van Duyne*, 204 A.2d 841, 852 (N.J. 1964), *cert. denied*, 380 U.S. 987 (1965), in which the New Jersey Supreme Court stated that prosecutors and defense lawyers could be disciplined for extrajudicial comments that "have the capacity to influence potential or actual jurors."

[14] The Court added that "[p]rofessional studies have filled out these suggestions [for curtailing pretrial publicity], recommending

In a concurring opinion, Justice Brennan, joined by Justices Stewart and Marshall, elaborated on this point. While Justice Brennan stated that, in his view, a prior restraint on *the press* is not constitutionally permissible unless national security is threatened, he sharply distinguished the situation at issue here. After quoting extensively from *Sheppard*, he noted that "[a]s officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice." 427 U.S. at 601 n.27. He concluded that "[i]t is very doubtful that the court would not have the power to control release of information by these individuals in appropriate cases, and to impose suitable limitations whose transgression could result in disciplinary proceedings." *Id.* (citations omitted).

In *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981), the Court addressed the authority of a district court in a class action suit to limit communications from named plaintiffs and their counsel to prospective class members. Although the Court struck down the order at issue, reasoning that it violated the policies of Federal Rule of Civil Procedure 23, it emphasized that its "decision regarding the need for careful analysis of the particular circumstances [was] limited to the situation before [it] —involving a broad restraint on communication with class members." 452 U.S. at 104 n.21. The Court noted that "the rules of ethics [for attorneys] properly impose restraints on some forms of expression" and that "[i]n the conduct of a case, a court often finds it necessary to restrict the free expression of participants, including counsel, witnesses, and jurors." *Id.*

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that trial courts in appropriate cases limit what the contending lawyers, the police, and witnesses may say to anyone." 427 U.S. at 564 (citation omitted). The Court did acknowledge in a footnote that it was not faced with the issue of whether "judicially imposed restraints on lawyers and others would be subject to challenge as interfering with press rights to news sources." *Id.* at 564 n.8.

Most recently, in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), the Court unanimously upheld a trial court order restricting a newspaper, which was a defendant in a defamation suit, from publishing certain information obtained from the plaintiff during discovery. In its decision, the Court stated that "[a]lthough litigants do not 'surrender their First Amendment rights at the courthouse door,' those rights may be subordinated to other interests that arise in this setting." *Id.* at 32-33 n.18 (citation omitted). It noted that "on several occasions [it] has approved restriction on the communications of trial participants where necessary to ensure a fair trial for a criminal defendant." *Id.* at 33 n.18. In support, the Court cited, *inter alia*, *Sheppard*, 384 U.S. at 361, *Gulf Oil*, 452 U.S. at 104 n.21, and both the majority opinion and Justice Brennan's concurrence in *Nebraska Press*, 427 U.S. at 563, 601 n.27.

In short, for more than three decades, this Court has acknowledged the broad authority of courts to restrict extrajudicial statements by lawyers that threaten the fairness of a judicial proceeding. There is simply no support in this Court's cases for imposing the rigid *Nebraska Press* standard in the context of lawyers' extrajudicial statements.[15]

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[15] The cases principally relied upon by petitioner in support of a clear and present danger standard (Pet. Br. 19-25) provide no support for his position. In *Bridges v. California*, 314 U.S. 252 (1941), *Pennekamp v. Florida*, 328 U.S. 331 (1946), and *Craig v. Harney*, 331 U.S. 367 (1947), the issue was whether a trial court could punish, through use of the contempt power, newspaper writers (and in *Bridges*, a labor official as well), who were *not* participants in the trial, for writing editorials, cartoons, and other items critical of judges in particular cases. Likewise, the issue in *Wood v. Georgia*, 370 U.S. 375 (1962), was whether a court in a contempt proceeding could summarily punish a sheriff for publicly criticizing a judge's orders to a grand jury. The Court emphasized that "there was no 'judicial proceeding pending' in the sense that prejudice might result to one litigant or the other by ill-considered misconduct aimed at influencing the outcome of a trial or a grand jury proceeding." *Id.* at 389. Finally, in *Landmark Communications*,

In addition to ignoring this Court's statements on the issue, petitioner and amici ignore the fact that their proposed standard for lawyers' extrajudicial statements has been rejected by the vast majority of lower court cases. As the Solicitor General correctly points out (U.S. Cert. Br. 14), most courts that have addressed the issue have approved a "reasonable likelihood" of prejudice standard,[16] which is less protective of First Amendment interests than the "substantial likelihood of material[] prejudic[e]" standard utilized in Rule 177. *See* pages 25-30, *infra* (discussing Rule 177).

Petitioner also fails to address the extent to which Nevada's disciplinary rule conforms to the approach taken in other states. The reason for this omission is clear: petitioner's approach would render unconstitutional at least 43 states' disciplinary rules governing extrajudicial statements. Lawyers' extrajudicial state-

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Inc. v. Virginia, 435 U.S. 829 (1978), which involved a prosecution of a publisher for reporting on a pending investigation by a state judicial review commission, this Court drew a clear distinction regarding a court's ability to punish the *participants* in an adjudicative proceeding and its ability to punish the *press* for its reports about that proceeding, noting that only the latter issue was involved. *Id.* at 837; *see also id.* at 849 (Stewart, J., concurring). None of these cases even discusses the standards applicable to extrajudicial statements by lawyers involved in pending cases. Moreover, as petitioner himself concedes, "none of these cases involved petit jury trials and the special problems that they create for the efficient and fair administration of justice in our courts" (Pet. Br. 26).

[16] *See, e.g., Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979); *United States v. Tijerina*, 412 F.2d 661 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969); *In re Hinds*, 449 A.2d 483 (N.J. 1982); *Zimmerman v. Bd. of Prof. Responsibility*, 764 S.W. 2d 757 (Tenn.), *cert. denied*, 109 S. Ct. 3160 (1989); *In re Disciplinary Proceedings Against Eisenberg*, 423 N.W. 2d 867 (Wis. 1988); *Younger v. Smith*, 30 Cal. App. 3d 138, 106 Cal. Rptr. 225 (1973); *Hughes v. State*, 437 A.2d 559 (Del. 1981); *Widoff v. Disciplinary Board*, 420 A.2d 41 (Pa. 1980), *affirmed sub nom. Cohen v. Disciplinary Board*, 430 A.2d 1151, *cert. denied*, 455 U.S. 914 (1982) (all upholding "reasonable likelihood of prejudice" standard).

ments about pending cases have been regulated for almost a century.[17] Currently, 31 states in addition to Nevada have adopted—either verbatim or with insignificant variations—Rule 3.6 of the ABA's Model Rules of Professional Conduct, which is virtually identical to Rule 177.[18] Eleven states have adopted Disciplinary Rule 7-107 of the ABA's Code of Professional Responsibility,[19] which is less protective of lawyer speech than Model Rule 3.6.[20] Only one state, Virginia, has explicitly adopted

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[17] In 1908, the ABA adopted the Canons of Professional Responsibility. Canon 20 provided that extrajudicial comments by lawyers about pending or anticipated litigation were "[g]enerally . . . to be condemned." *See generally* G. Archer, *Ethical Obligations* 200 (Little Brown 1910) ("If a lawyer, either through a desire for personal notoriety, or with an intent to injure the adverse party, gives out [to newspapers] facts or allegations of facts that should properly be reserved until the trial day, he is guilty of improper conduct.").

[18] Arizona, Arkansas, Connecticut, Idaho, Indiana, Kansas, Kentucky, Maryland, Mississippi, Missouri, New Mexico, Pennsylvania, Rhode Island, South Carolina, West Virginia and Wyoming have adopted Model Rule 3.6 verbatim. Delaware, Florida, Louisiana, Montana, New Hampshire, New Jersey, New York, Oklahoma, South Dakota, Texas, and Wisconsin have adopted Model Rule 3.6 with minor modifications that are irrelevant to the issues presented in this case. Michigan and Washington have adopted only subsection (a) of Model Rule 3.6. Minnesota's Rule 3.6, which consists of only subsection (a) of the Model Rule and limits its application to "pending criminal jury trial[s]," is likewise jeopardized by petitioner's approach. Utah employs a version of Model Rule 3.6 including a "substantial likelihood of material[] influenc[e]" standard which, arguably, is less protective of lawyer speech than Model Rule 3.6 and Rule 177. *See generally* Appendix D (citations to state rules governing lawyers' extrajudicial statements).

[19] Alaska, Colorado, Georgia, Hawaii, Iowa, Massachusetts, Nebraska, Ohio, Tennessee and Vermont have adopted D.R. 7-107 verbatim. North Carolina also uses the "reasonable likelihood" test of D.R. 7-107.

[20] As explained on page 27, *infra*, the ABA replaced D.R. 7-107 with Model Rule 3.6 to insulate more statements by lawyers from regulation.

a clear and present danger standard.[21] The fact that petitioner's approach has been rejected in the vast majority of states is without question probative and entitled to weight. *See Butterworth v. Smith*, 110 S. Ct. 1376, 1383 (1990) (noting, in striking down a Florida rule prohibiting a grand jury witness from ever disclosing his testimony before that body, that only 14 other states had such a rule; Court found such statistics "probative of the weight to be assigned Florida's asserted interests"); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 841 (1978).

B. The Present State of the Law Is Well-Justified by Unique Considerations Applicable to Lawyers Handling Pending Cases in Court, Which Justify Many Restrictions on Their Speech That Could Not Be Imposed on Others

In urging the *Nebraska Press* standard in the context of lawyers' extrajudicial statements about pending cases, petitioner overlooks the fundamental principle that First Amendment considerations must be "applied in light of the special characteristics of the . . . environment."

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[21] Four states and the District of Columbia have adopted standards that arguably approximate "clear and present danger": Illinois ("serious and imminent threat to the fairness of an adjudicative proceeding"); Maine ("substantial danger of interference with the administration of justice"); North Dakota ("serious and imminent threat of materially prejudicing an adjudicative proceeding"); Oregon ("serious and imminent threat to the fact finding process of an adjudicative proceeding and acts with indifference to that effect"); and the District of Columbia ("serious and imminent threat to the impartiality of the judge or jury"). Alabama adopted Model Rule 3.6 verbatim, but the comments to that state's provision cast doubt on the standard by which attorney's extrajudicial statements should be judged. California has no express provision dealing with attorneys' extrajudicial comments about pending cases. *Cf. Younger v. Smith*, 30 Cal. App. 3d 138, 165, 106 Cal. Rptr. 225 (1973) (applying "reasonable likelihood of prejudice" test in context of gag order on all attorneys connected with the case).

Tinker v. Des Moines School District, 393 U.S. 503, 506 (1969).[22] As the above-quoted statements in *Sawyer*, *Sheppard*, *Gulf Oil*, *Nebraska Press*, and *Seattle Times* make clear, two related factors are critical in analyzing the First Amendment issues involved here: the lawyer's role as an officer of the court and his role as an advocate in a pending adjudicative proceeding. These factors distinguish lawyers from the press and other non-participants in the trial process.

It is beyond dispute that "[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary government function of administering justice and have historically been 'officers of the courts.'" *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975). More than a century ago, the Court stated that attorneys were required to comply with court-imposed ethical standards requiring "respect due to courts . . . and judicial officers" both inside and outside the courtroom. *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 355 (1871). Violation of such standards, the Court noted, could subject an attorney to discipline, "such as reprimand, temporary suspension, or fine. . . ." *Id.* The Court has made numerous similar statements over the

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[22] The Court has applied this principle in a variety of contexts. *See, e.g., Thornburgh v. Abbott*, 109 S. Ct. 1874 (1989) (government regulation of prisoner access to publications are valid if reasonably related to legitimate penological interests); *Hazelwood School District v. Kuhlmeier*, 108 S. Ct. 562 (1988) (educators do not violate First Amendment by exercising editorial control over student newspaper in order to further legitimate pedagogical concerns); *Connick v. Myers*, 461 U.S. 138 (1983) (public employee may be disciplined for speech about matters that are not of public concern); *Parker v. Levy*, 417 U.S. 733, 758 (1974) (military may punish speech in ways that would be impermissible outside the military); *see also Theard v. United States*, 354 U.S. 278, 281 (1957) ("Membership in the bar is a privilege burdened with conditions."). As these cases demonstrate, petitioner errs in stating (Pet. Br. 35-36) that the status of the speaker is irrelevant to First Amendment analysis.

years. *See* pages 12-17, *supra*; *see also Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 434 (1982) (noting that "[t]he judiciary as well as the public . . . has a significant interest in assuring and maintaining high standards of conduct of attorneys engaged in practice") (citations omitted).

There is no objective more critical in the administration of justice than ensuring that trials are conducted fairly, based on the evidence in court. As this Court has stated, "trials are not like elections, to be won through the use of the meeting hall, the radio, and the newspapers." *Bridges v. California*, 314 U.S. 252, 271 (1941). Rather, the results should "be induced only by evidence and argument in open court. . . ." *Patterson v. Colorado*, 205 U.S. 454, 462 (1907). To achieve these objectives, courts must depend on lawyers not to "resort to the media for public favor in a pending action. . . ." ABA Advisory Comm., *Standards Relating to Fair Trial and Free Press* 86 (Tentative Draft 1966). It is difficult to conceive of anything more inimical to the role of an "officer of the court" than a lawyer involved in a case who uses the press to influence the outcome of a trial.

Moreover, as participants in a particular case, lawyers have special access to information, including confidential statements from clients and information obtained through pretrial discovery or plea negotiations. For this reason, their extrajudicial statements pose the greatest possible threat because they are likely to be received as especially authoritative. *See, e.g., In re Hinds*, 449 A.2d 483, 496 (N.J. 1982) (statements by attorneys of record relating to the case "are likely to be considered knowledgeable, reliable and true" because of attorneys' unique access to information); *In re Rachmiel*, 449 A.2d 505, 511 (N.J. 1982) (attorneys' role as advocates gives them "extraordinary power to undermine or destroy the efficacy of the criminal justice system"). *Cf. Seattle Times*, 467 U.S. 20 (holding that a newspaper that was a party to

a case could be prevented from disseminating information obtained through pretrial discovery); *Sawyer*, 360 U.S. at 667 (Frankfurter, J., dissenting) ("The delicate scales of justice ought not to be willfully agitated from without by any of the participants responsible for the fair conduct of the trial.").

A few examples will illustrate why the *Nebraska Press* standard makes no sense in the context of lawyers' extrajudicial statements. Assume that a trial judge in a criminal case has ruled three months prior to trial that (1) a key prosecution witness cannot be impeached with evidence that he is a member of the Mafia, and (2) the defendant's confession to the police was involuntary and may not be offered at trial. Under *Nebraska Press*, it is highly unlikely that the press could be prohibited from publishing information about the witness' alleged Mafia ties or about the defendant's confession. Considering less restrictive alternatives, it is probable that voir dire, postponement of the trial, change of venue, and/or jury instructions could dissipate the impact of such an account, thereby making it possible that 12 jurors could be found who could base their decision solely on the evidence adduced at trial. *Cf. Nebraska Press*, 427 U.S. at 563-64; Pet. Br. 28-31. This standard is necessary to ensure a vigorous press. But under petitioner's standard, the defense lawyer, immediately upon receiving the court's ruling, could call a press conference for the purpose of disseminating information about the prosecution witness to prospective jurors. Similarly, the prosecutor could assemble the press and read the text of the defendant's confession. In both situations, the lawyers could not be disciplined.

Similarly, under the *Nebraska Press* standard, the state bar authorities would be precluded from (1) disciplining the defense lawyer for standing outside the courthouse and announcing to prospective jurors the prosecution witness' Mafia ties, or (2) disciplining the prosecutor for standing in that spot and handing out printed

copies of the defendant's confession. Since the judge can simply postpone the trial until a new jury venire begins service, or identify jurors (through an extremely detailed and time consuming voir dire) who did not receive the inadmissible evidence, neither the defense lawyer nor the prosecutor would have created a "clear and present danger" under the *Nebraska Press* standard. We submit that it would be absurd to conclude that the bar authorities would be forbidden by the First Amendment to discipline the prosecutor or defense lawyer in these situations.

If accepted by this Court, petitioner's approach would communicate to lawyers that they now have broad freedom to influence potential jurors through the press. Lawyers would increasingly publicize their opinions on the merits of their cases, highlight inadmissible or questionable evidence, and discuss the credibility of key witnesses. Indeed, lawyers would be free to use extensive media coverage as a tactic for prejudicing potential jurors when the goal is to seek a continuance or a change of venue. Rules such as Rule 177 were adopted precisely to protect the judicial system from this type of conduct by lawyers.

To prevent the foregoing results, courts would inevitably be forced to interpret the *Nebraska Press* standard to allow discipline in such situations. The result would be a dilution of the rigorous *Nebraska Press* standard—to the serious detriment of the press.

Moreover, if the *Nebraska Press* standard were applied to lawyers in pending cases, a whole array of common ethical restrictions would be open to serious constitutional question. For example, Nevada, like other states, requires lawyers to keep client confidences (Nev. Sup. Ct. R. 156); to avoid conversing with jurors "[b]efore or during trial . . . on any subject whether pertaining to the case or not" (Nev. Sup. Ct. R. 176.1); and to avoid, in post-trial juror interviews, saying anything that would "embarrass[]" any juror or that would "influence his or her action in subsequent jury service" (Nev. Sup. Ct. R. 176.3). *Cf. Gulf Oil*, 452 U.S. at 104 n.21 (approving D.R. 7-104, which prohibits, *inter alia*, a lawyer representing a client from communicating directly with the opposing party without opposing counsel's consent, unless specifically authorized by law). Petitioner and amici cannot seriously argue that a lawyer should be treated like the press and laypersons in these circumstances and that, notwithstanding the ethical rules, all communications by lawyer are permissible unless the *Nebraska Press* standard is satisfied. Yet their position —which fails to recognize the unique status of lawyers involved in pending cases—admits of no other reasonable construction.

C. Rule 177's Substantial Likelihood of Material Prejudice Test and Specific Provisions Elaborating Upon That Test Properly Balance the Protection of Judicial Integrity and Fairness Against First Amendment Interests

This Court's cases make clear that when a state regulation implicates the First Amendment rights of trial participants, the Court must balance those interests against the state's legitimate interests in regulating the activity in question. *See, e.g., Seattle Times*, 467 U.S. at 32. Specifically, the Court must "consider whether the 'practice in question [furthers] an important or substantial governmental interest unrelated to the suppression' and whether 'the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the governmental interest involved.'" *Id., quoting Procunier v. Martinez*, 416 U.S. 396, 413 (1974).[23] Viewed in this light, Rule 177 passes constitu-

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[23] The *Seattle Times* test is applicable because, like the newspaper/defendant in that case, attorneys involved in pending cases have special access to information, through discovery and otherwise. *See* page 22, *supra*. It differs somewhat from the test articulated in *Butterworth*, which required a showing of "'a need to fur-

tional muster. The Rule is carefully drawn to protect the integrity and fairness of Nevada's judicial system, while imposing only narrow and necessary limitations on lawyers' speech.

In attacking Rule 177, petitioner sets up a straw man by mischaracterizing it as a "reasonable likelihood" of prejudice or "reasonable tendency" standard (*see* Pet. 10, 12; Pet. Cert. Reply Br. 2, 3, 7; Pet. Br. 26). In fact, Rule 177, which is virtually identical to Model Rule 3.6,[24] adopts a far more exacting standard—"substantial likelihood of materially prejudicing an adjudicative proceeding."

The history of Model Rule 3.6 confirms that it is a more exacting standard than prior rules governing lawyers' extrajudicial statements. In 1968, in response to this Court's 1966 *Sheppard* decision, the ABA established an Advisory Committee on Fair Trial and Free Press, chaired by Justice Paul Reardon of the Massachusetts Supreme Court. Justice Reardon's committee recommended that the ABA adopt a "reasonable likelihood of prejudice" standard to govern lawyers' extrajudicial statements.[25] The following year the ABA adopted D.R.

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ther a state interest of the highest order' " to support a permanent ban on disclosure by a witness of his own grand jury testimony. 110 S. Ct. at 1381, *quoting Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979). There the Court relied on the fact that the witness did not have special access to information "as a result of his participation in the [grand jury] proceedings" and distinguished *Seattle Times* on that ground. The *Seattle Times* standard is also appropriate here because lawyers are officers of the court and are subject to special ethical restrictions. *See* pages 21-22, *supra*. Even if the Nevada State Bar were required to show a compelling state interest, however, that requirement would be satisfied in light of the State's paramount interest in ensuring the fairness of judicial proceedings. *See* pages 28-30, *infra*.

[24] Model Rule 3.6 is reprinted in full in Appendix B.

[25] ABA, *Standards Relating to Fair Trial and Free Press* 1 (Approved Draft 1968); *see also* Committee on the Operation of the Jury System, Judicial Conference of the United States, *Report*

7-107, which incorporated that recommendation. *See* Appendix C, *infra* (reproducing D.R. 7-107).

In 1983, the ABA adopted the Model Rules, including Model Rule 3.6. Nevada adopted Model Rule 3.6 in January 1986. Nev. Sup. Ct. R. 177. This Rule incorporates a "substantial likelihood of material[] prejudic[e]" standard. The comments and notes to Model Rule 3.6 confirm what the plain language reveals—that the purpose of the change from the "reasonable likelihood" standard was to make it *more* difficult to discipline an attorney for extrajudicial statements. *See* ABA Model Rules of Professional Conduct, Proposed Final Draft and Comments ("Proposed Final Draft") 143-45 (May 30, 1981) (explaining that the standard was revised in light of constitutional problems with D.R. 7-107 identified by two court decisions).[26]

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of the Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue, 45 F.R.D. 391, 404 (1968) (making similar recommendation). *Cf. Sheppard*, 384 U.S. at 362-63.

[26] The notes accompanying the Proposed Final Draft, which were not incorporated into the official Rules and Commentary, *see* ABA Model Rules of Professional Conduct (Rev. ed. 1989), state that the Rule "incorporates a standard approximating clear and present danger by focusing on the likelihood of injury and its substantiality." Proposed Final Draft at 145. This reference to the clear and present danger test was presumably included to indicate that the Rule embodies a relatively strict standard under which only a small portion of attorney speech will be prohibited. It cannot reasonably be understood to suggest that the Rule's "substantial likelihood of material[] prejudic[e]" test and other detailed provisions should simply be read as a surrogate for this Court's jurisprudence on prior restraint of the press. The Rule is far too explicit to admit of such a construction, and plainly contemplates restrictions on speech that could not be imposed on the press. Moreover, the phrase "clear and present danger" is not the sort of "technical legal doctrine" or "formula for adjudicating cases," *Landmark Communications*, 435 U.S. at 842, *quoting Pennekamp*, 328 U.S. at 353, that would carry such an implication.

To the extent that one might read the note as suggesting that the Rule has adopted the *Nebraska Press* standard, it is incorrect. We agree with petitioner that the text of Rule 177 makes clear

To assist the lawyer in deciding whether an extrajudicial statement is likely to cause material prejudice, the Rule sets out statements that, in civil jury cases, criminal cases, and other proceedings that could result in incarceration, ordinarily are likely to cause such prejudice.[27] These include, *inter alia*, statements relating to the character, credibility, reputation, or criminal record of a party, criminal suspect, or witness; the expected testimony of a party or witness; the performance or results of examinations or tests or the refusal of a person to submit to an examination or test; and any opinion as to the guilt or innocence of a defendant or suspect in a criminal case. Rule 177.2. *See* Appendix A, *infra*. This list closely tracks language in this Court's *Sheppard* decision.[28] The Rule also specifies information that a lawyer "may state without elaboration," including, *inter alia*, the general nature of the claim or defense and information in public records. *See* Rule 177.3.

As its text reveals, Rule 177 is aimed at "prejudic[e to] an adjudicative proceeding." This formulation encom-

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that it is less exacting than the *Nebraska Press* standard. *Cf.* Nev. Sup. Ct. R. 150 ("The preamble and comments to the A.B.A. Model Rules of Professional Conduct are not enacted by this Rule but may be consulted for guidance in interpreting and applying the Nevada Rules of Professional Conduct, unless there is a conflict between the Nevada Rules and the preamble or comments.").

[27] Contrary to petitioner's contention (Pet. Br. 45-46), these are not evidentiary presumptions. Rule 177 was specifically designed to *avoid* the categorical prohibitions of attorney speech contained in D.R. 7-107. *See* Notes to Proposed Final Draft at 143-44.

[28] In *Sheppard*, the Court stated that the trial court in that case could have proscribed prejudicial extrajudicial statements by lawyers and other participants, "such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case." 384 U.S. at 361 (citations omitted).

passes two principal evils: (1) comments that are likely to influence the actual outcome of the trial, and (2) comments that are likely to prejudice the jury venire, even if an untainted panel can ultimately be found. Obviously, an outcome affected by extrajudicial statements is an evil to be avoided. *See, e.g., Sheppard*, 384 U.S. at 350-51; *Turner v. Louisiana*, 379 U.S. 466, 473 (1965) (evidence in criminal trial must come solely from witness stand in public courtroom with full evidentiary protections); *Patterson*, 205 U.S. at 462. Few, if any, interests under the Constitution are more fundamental than the right to a fair trial. *See, e.g., Estes v. Texas*, 381 U.S. 532, 540 (1965) (describing the right to a fair trial as "the most fundamental of all freedoms").

Even if a fair trial can ultimately be ensured through voir dire, change of venue, or another device, the poisoning of the venire entails serious costs. The system suffers greatly when one potential juror after another is excused because of knowledge obtained from a lawyer's extrajudicial statements. As is typically the case where there is pretrial publicity, it will often be the better-informed jurors who are thereby disqualified. If a juror proclaims that he or she will not be influenced by a participating lawyer's statement, and is allowed to serve, a serious shadow is nonetheless cast over the trial as it proceeds. If more extreme measures, such as change of venue or continuance, are required, the costs to the system are considerable. Officers of the court should not be allowed to inflict such costs on the judiciary. *Cf. Hinds*, 449 A.2d at 495 n.5 (noting that options such as voir dire, change of venue, and jury instructions "do not obviate the need for properly fashioned restrictions on extrajudicial speech of attorneys participating in criminal trials"); *State v. Van Duyne*, 204 A.2d 841, 852 (1964) (noting need to discipline lawyers whose statements are likely "to influence potential or actual jurors").[29]

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[29] Numerous ethical standards are applicable to conduct affecting both actual and prospective jurors. *See, e.g.*, Nev. Sup. Ct. R. 174

In sum, Rule 177 is aimed at a critical objective—protecting the integrity of the judicial system. The standard adopted is an exacting one: only when there has been a serious threat to the system will an attorney's extrajudicial statements about a pending case warrant discipline.

D. Rule 177 Is Neither Vague nor Overbroad

In a brief discussion citing virtually no authority, petitioner invokes the void-for-vagueness and overbreadth doctrines, claiming that (1) Rule 177 did not provide him with adequate notice that his comments were subject to discipline, and (2) the Rule is facially unconstitutional because it applies to more speech than is necessary to serve the state's goals (Pet. Br. 46-49). These arguments are meritless.

The "void-for-vagueness" doctrine involves considerations of fair notice and adequate warning. *See, e.g., Smith v. Goguen*, 415 U.S. 566, 572-73 (1974); *Colton v. Kentucky*, 407 U.S. 104, 110 (1972); *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964). The Rule was carefully drafted with such considerations in mind to provide "an illustrative compilation that gives fair notice of conduct ordinarily posing unacceptable dangers to the fair administration of justice." Proposed Final Draft at 143. Plainly, the Rule provides ample notice of the nature of the prohibited conduct, particularly for lawyers. *See generally Matter of Keiler*, 380 A.2d 119, 126 (D.C. App. 1977) ("language of a rule setting guidelines for members of the bar need not meet the precise standards of

(providing that a lawyer shall not "[s]eek to influence a . . . juror [or] prospective juror . . ."); Nev. Sup. Ct. R. 176.1 (prohibiting currying favor of jurors "[b]efore and during the trial"); Nev. Sup. Ct. R. 176.2 (requiring lawyer to disclose to judge and opposing counsel information bearing on the interest of any juror or prospective juror in the outcome of a case); Nev. Sup. Ct. R. 176.4(b) (prohibiting "direct or indirect communication with a prospective juror").

clarity that might be required of rules of conduct for laymen"), *overruled on other grounds, In re Hutchinson*, 534 A.2d 919 (D.C. App. 1987).

Indeed, under the present circumstances, petitioner's lack of notice argument can only be viewed as disingenuous. As explained on pages 35-37, *infra*, petitioner plainly had as his primary objective the violation of Rule 177's core prohibition—to prejudice the upcoming trial by influencing potential jurors. Moreover, while criticizing the Rule as providing inadequate notice, petitioner also attacks it in another section of his brief for setting out categories of speech that are likely to be prejudicial (Pet. Br. 44-45). *See* note 27, *supra*. Petitioner cannot have it both ways—arguing simultaneously that the Rule is both too detailed and not detailed enough.

The "overbreadth" doctrine applies if an enactment "prohibits constitutionally protected conduct." *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972). To be unconstitutional, overbreadth must be "substantial." *Board of Trustees of State University of New York v. Fox*, 109 S. Ct. 3028, 3037 (1989); *New York v. Ferber*, 458 U.S. 747, 769 (1982).[30] The doctrine has been described as "'manifestl[y] strong medicine' that is employed 'sparingly, and only as a last resort.'" *Massachusetts v. Oakes*, 109 S. Ct. 2633, 2637 (1989), *quoting Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

Petitioner fails to raise a claim of substantial overbreadth—or, in fact, *any* overbreadth at all. Rule 177 is no broader than necessary to protect the State's interests. Rule 177 applies only to lawyers involved in the pending case at issue,[31] not to other lawyers or to non-lawyers.

[30] Petitioner errs in arguing (Pet. Br. 48 n.42) that in the case of pure speech, overbreadth need not be substantial to violate the First Amendment. *See, e.g., Brockett v. Spokane Arcades*, 472 U.S. 491, 503 n.12 (1985), *citing Ferber*, 458 U.S. at 772.

[31] Although parts one and two of Rule 177 do not specifically so state, Rule 177.3, by its terms, applies only to "a lawyer involved

Moreover, even lawyers involved in pending cases can make extrajudicial statements as long as such statements do not present a substantial risk of material prejudice to an adjudicative proceeding. Indeed, Rule 177.3 identifies a variety of statements that lawyers in pending cases can make. In sum, the Rule is drafted narrowly so that it encompasses only statements that are very likely to prejudice an adjudicative proceeding.[32]

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in the investigation or litigation of a matter . . . ." In applying Rule 177, the Nevada Bar has consistently read that same limitation as applying to all three parts of the Rule. We know of no cases applying Rule 177 or Model Rule 3.6 to lawyers *not* involved in a proceeding, and petitioner fails to cite any. The Rule's clarity on this point derives in part from the fact that Model Rule 3.6 (from which Rule 177 was derived) was designed to provide *greater* free speech protections to lawyers than D.R. 7-107, which, by its terms, applied to "[a] lawyer or law firm associated with" a criminal or civil matter. *Cf. Hinds*, 449 A.2d at 496 (explaining meaning of "associated with" under D.R. 7-107). There is nothing to suggest that the ABA, in adopting Model Rule 3.6, intended to expand the coverage of D.R. 7-107 to include lawyers *not* associated with a case.

[32] Petitioner claims that Rule 177 is overbroad because it applies to bench trials (Pet. Br. 49). The Rule's "substantial likelihood of material[] prejudic[e]" test will rarely be met where the judge is the trier of fact, since trial judges often have access to inadmissible and highly prejudicial information and are presumed to be able to discount it. Notes to Model Rule 3.6 (Proposed Final Draft at 146). Nonetheless, as the notes to Model Rule 3.6 state, the infrequency of actual violations does not justify a conclusion that the Rule is categorically inapplicable in that setting. *Id.*

Petitioner's assertion that Rule 177 is overbroad because it subjects to discipline speech made without intent to prejudice trials (Pet. Br. 49) is likewise without merit. *Scales v. United States*, 367 U.S. 203, 229-30 (1960), cited by petitioner, is not to the contrary. That case discussed the requirements for convicting persons under the Smith Act, 18 U.S.C. § 2385, for belonging to organizations espousing overthrow of the United States Government by force or violence. The case cannot be read to stand for the proposition that in all contexts a state may prohibit only speech

E. Rule 177 Does Not Prevent an Attorney From Vigorously Representing His Client and Does Not Seriously Hamper the Press From Reporting News to the Public

Petitioner, joined by various amici, argues that Rule 177 raises Sixth Amendment concerns because it prevents a lawyer from adequately representing his client (Pet. Br. 41; NACDL Br. 9; NACJ Br. 21). In addition, the American Newspaper Publishers Association, *et al.*, argues that Rule 177, by restricting comments that lawyers can make to the press, unconstitutionally deprives the public of important information (ANPA Br. 7). These arguments lack merit.

The Sixth Amendment argument erroneously assumes that a lawyer has a constitutional obligation to taint potential or actual jurors by trying his case in the press. No case holds or suggests that there is any such obligation. Indeed, this Court has made clear that cases should be tried in court, not in the press. *See, e.g., Bridges*, 314 U.S. at 271; *Patterson*, 205 U.S. at 462. Nor is such a Sixth Amendment question created if a lawyer is responding to public comments by his opponent. A defendant's protection rests with voir dire, change of venue, jury instructions, and, in extreme cases, reversal on due process grounds. The proper remedy for prosecutorial abuses of the press is not to permit virtually all extrajudicial comments by lawyers, but instead to discipline prosecutors who violate the Rule.[33] Indeed, a public re-

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made with specific intent to harm the interest the government seeks to protect. A statement can prejudice a proceeding even if it was made recklessly or negligently. Plainly, a lawyer is expected to know and follow the ethical rules, and should not be able to invoke a First Amendment defense simply because he did not intentionally violate such a rule.

[33] *See, e.g., In re Hanson*, 584 P.2d 805 (Utah 1978) (Attorney General held in violation of DR 7-107). Any argument that prosecutors are somehow not reasonably subject to discipline should be given short shrift by this Court. Absent some law to the con-

sponse "may well aggravate the prejudice to the defendant, particularly if it induces a further response by the prosecution, and may render more difficult the obtaining of judicial relief." ABA Advisory Comm., *Standards Relating to Fair Trial and Free Press* 86 (Approved Draft 1968). Furthermore, Rule 177 does not interfere with the formation of the attorney-client relationship and does not hamper the ability of organizations to bring cases of public significance. *Cf. In re Primus*, 436 U.S. 412 (1978); *NAACP v. Button*, 371 U.S. 415 (1963).

The argument that the public's First Amendment rights are violated is equally groundless. Rule 177 is not inconsistent with a vigorous press or an informed public. That Rule neither "close[s] the door of permissible public comment," *Pennekamp*, 328 U.S. at 350, nor creates an "endless series of moratoria on public discussions." *Bridges*, 314 U.S. at 269. The only voices regulated are those of the attorneys participating in trial; only information that poses a substantial likelihood of materially prejudicing the adjudication is proscribed; and the Rule poses no restrictions once the trial is over. *Cf. Butterworth*, 110 S. Ct. 1376 (invalidating Florida statute imposing *permanent* ban on disclosure by a witness of his own testimony once a grand jury has been discharged).

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trary—and none has been cited—state prosecutors are governed by the ethical rules of their state bars. As to federal prosecutors, it is true that in case of conflict between state ethical rules and federal law, federal law must govern under the Supremacy Clause. U.S. Const. art. VI, cl. 2. But such conflicts are rare, at best. *See* 28 C.F.R. § 50.2(b)(2) (Department of Justice regulation governing pending criminal proceedings, which uses a "reasonable likelihood" standard); *see also, e.g.*, S.D. Fla. Ct. Gen. Local R. 21(A)(1); N.D. Ga. Ct. Gen. Local R. 115(2)(a); W.D. Mo. Ct. Gen. Local R. 5(A); D. Mont. Ct. Gen. Local R. 130(1)(b); E.D. Va. Ct. Gen. Local R. 8(A) (all prohibiting lawyers' comments in various circumstances under "reasonable likelihood" standard). And to the extent that there is no conflicting federal provision or duty, it seems highly likely that the state bar ethical provisions will be recognized as binding on federal prosecutors, as a matter of federal common law.

Moreover, information can—and will—reach the public, from the press and from sources other than the lawyers involved. For instance, nothing in Rule 177 prevents lawyers not in a trial from providing commentary about a pending case, and nothing prevents news organizations from hiring lawyers as consultants for legal matters. Indeed, both of these approaches are very common, as the press coverage of any prominent case demonstrates. Moreover, this Court's decisions have ensured that, except in extraordinary situations, the press will have full access to trials and other judicial proceedings. *See, e.g., Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). Significantly, no evidence is cited to suggest that rules such as Rule 177 have hampered the ability of the press to provide information, even though such a rule—or a less exacting one—exists in 43 states. *See* pages 18-20, *supra*. Nevada is simply urging this Court to approve rules governing lawyers' extrajudicial statements that have co-existed for decades with a free and vigorous press.

II. RULE 177 WAS APPLIED FAIRLY IN THIS CASE

Petitioner maintains that his extrajudicial statements were carefully "measured" based on a thorough study of Rule 177 (Pet. Br. 47). According to petitioner, the fact that the prosecution was not disciplined demonstrates that the Nevada Bar acted with "discriminatory motives" (*id.* at 48).

This argument is frivolous. There is no evidence that disciplinary proceedings were brought because petitioner obtained an acquittal or for any other improper motive. Justice Young referred the matter to the Bar in March of 1988, only weeks after the press conference and months before the trial (J.A. 83). He based the referral on newspaper accounts of the press conference. There is nothing improper about the fact that formal charges were

not brought until after the Sanders trial was over. Obviously, the Bar did not want to undermine petitioner's defense of his client by bringing proceedings before or during trial.

More fundamentally, petitioner's argument is based on the false premise that his extrajudicial statements were permissible under Rule 177. In fact, however, there can be no serious question that petitioner violated Rule 177. Contrary to the warning of Rule 177.2(d), he discussed at length his personal opinion on the innocence of Grady Sanders, stating, for example, that "I know I represent an innocent man" (Pet. App. 12a).[34] Contrary to the warning of Rule 177.2(c), he disclosed Sanders' failure to take a polygraph test and opined that polygraph tests are unreliable (Pet. App. at 13a). And, contrary to the warning of Rule 177.2(a), he commented at length on the character, reputation, and criminal records of the government's witnesses. In addition to opining that Scholl was the culprit, petitioner also suggested that Scholl was a cocaine user (Pet. App. 14a). He also characterized the other theft victims as "known drug dealers and convicted money launderers and drug dealers" (*id.* at 8a).[35]

While petitioner points out that his comments were made six months before trial (Pet. Br. 28 n.24), the critical fact, as the Nevada Supreme Court noted, is that he

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[34] To bolster his claim that Sanders was innocent, he opined that Detective Steve Scholl was in fact the perpetrator (Pet. App. at 8a).

[35] Petitioner states that his comments were all admissible at trial (Pet. Br. 8). In fact, a lawyer is prohibited from "stating a personal opinion as to . . . the credibility of a witness . . . or the guilt or innocence of an accused," or from "allud[ing] to any matter that . . . will not be supported by admissible evidence." Nev. Sup. Ct. R. 173.5; *see also United States v. Young*, 470 U.S. 1, 8-9 (1985) (neither prosecution nor defense may inject personal beliefs into presentation of case); *Yates v. State*, 734 P.2d 1252 (Nev. 1987) (same).

selected the time of maximum press coverage—the date of Sanders' arraignment (Pet. App. 4a). He admitted selecting the date because he "knew that once [the indictment] became public knowledge . . . the media was going to be all over the courtroom." (J.A. 43).

Finally, while the Nevada Supreme Court stated that there was no actual prejudice to the trial (Pet. App. 4a), there is no question that the comments had a substantial *likelihood* of materially prejudicing the jury venire. Indeed, at his disciplinary hearing, petitioner admitted that his very purpose for holding the press conference was to influence the potential jurors. He specifically testified that his goal was to "fight back" and counter the fact that the prosecution had "poison[ed] a perspective [sic] juror venire" (J.A. 45). Rule 177, however, contains no exception permitting one side to prejudice the prospective jury simply because he believes the other side has done so. In short, while petitioner claims to have studied and researched Rule 177 the night before his press conference (J.A. 43), even the most cursory reading of the Rule reveals that petitioner was not even close to the line.

CONCLUSION

The judgment of the Nevada Supreme Court should be affirmed.

Respectfully submitted,

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APPENDICES

APPENDIX A

Nevada Supreme Court Rule 177

Prior to January 5, 1991, Nevada Supreme Court Rule 177 stated: [1]

Trial Publicity.

1. A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

2. A statement referred to in subsection 1 ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

(a) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(b) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(c) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity

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[1] As noted on page 11, *supra*, the Rule was amended on November 7, 1990 (effective January 5, 1991) to add the following language at the beginning of subsection one: "Notwithstanding the provisions of any contrary statute or rule. . . ."

or nature of physical evidence expected to be presented;

(d) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(e) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or

(f) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

3. Notwithstanding subsection 1 and 2(a-f), a lawyer involved in the investigation or litigation of a matter may state without elaboration:

(a) the general nature of the claim or defense;

(b) the information contained in a public record;

(c) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;

(d) the scheduling or result of any step in litigation;

(e) a request for assistance in obtaining evidence and information necessary thereto;

(f) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(g) in a criminal case:

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

APPENDIX B

ABA Model Rules of Professional Conduct, Rule 3.6

RULE 3.6 Trial Publicity.

(a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

(b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence

in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

(c) Notwithstanding paragraph[s] (a) and (b) (1-5), a lawyer involved in the investigation or litigation of a matter may state without elaboration:

(1) the general nature of the claim or defense;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case:

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

APPENDIX C

ABA Code of Professional Responsibility, DR 7-107

DR 7-107 Trial Publicity.

(A) A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration:

(1) Information contained in a public record.

(2) That the investigation is in progress.

(3) The general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim.

(4) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.

(5) A warning to the public of any dangers.

(B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:

(1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.

(2) The possibility of a plea of guilty to the offense charged or to a lesser offense.

(3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.

(4) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.

(5) The identity, testimony, or credibility of a prospective witness.

(6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

(C) DR 7-107(B) does not preclude a lawyer during such period from announcing:

(1) The name, age, residence, occupation, and family status of the accused.

(2) If the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.

(3) A request for assistance in obtaining evidence.

(4) The identity of the victim of the crime.

(5) The fact, time, and place of arrest, resistance, pursuit, and use of weapons.

(6) The identity of investigating and arresting officers or agencies and the length of the investigation.

(7) At the time of seizure, a description of the physical evidence seized, other than a confession, admission, or statement.

(8) The nature, substance, or text of the charge.

(9) Quotations from or references to public records of the court in the case.

(10) The scheduling or result of any step in the judicial proceedings.

(11) That the accused denies the charges made against him.

(D) During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that he may quote or refer without comment to public records of the court in the case.

(E) After the completion of a trial or disposition without trial of a criminal matter and prior to the imposition of sentence, a lawyer or law firm associated with the prosecution or defense shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by public communication and that is reasonably likely to affect the imposition of sentence.

(F) The foregoing provisions of DR 7-107 also apply to professional disciplinary proceedings and juvenile disciplinary proceedings when pertinent and consistent with other law applicable to such proceedings.

(G) A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or refer-

ence to public records, that a reasonable person would expect to be disseminated by means of public communication and that relates to:

(1) Evidence regarding the occurrence or transaction involved.

(2) The character, credibility, or criminal record of a party, witness, or prospective witness.

(3) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.

(4) His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.

(5) Any other matter reasonably likely to interfere with a fair trial of the action.

(H) During the pendency of an administrative proceeding, a lawyer or law firm associated therewith shall not make or participate in making a statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication if it is made outside the official course of the proceeding and relates to:

(1) Evidence regarding the occurrence or transaction involved.

(2) The character, credibility, or criminal record of a party, witness, or prospective witness.

(3) Physical evidence or the performance or results of any examinations or tests or the refusal or failure of a party to submit to such.

(4) His opinion as to the merits of the claims, defenses, or positions of an interested person.

(5) Any other matter reasonably likely to interfere with a fair hearing.

(I) The foregoing provisions of DR 7-107 do not preclude a lawyer from replying to charges of misconduct publicly made against him or from participating in the proceedings of legislative, administrative, or other investigative bodies.

(J) A lawyer shall exercise reasonable care to prevent his employees and associates from making an extrajudicial statement that he would be prohibited from making under DR 7-107.

APPENDIX D

State Trial Publicity Provisions Governing Attorneys

State	Provision and Year of Adoption
Alabama	Alabama Rules of Professional Conduct, Rule 3.6 (1990)
Alaska	Alaska Code of Professional Responsibility D.R. 7-107 (1971)
Arizona	Arizona Rules of Professional Responsibility, E.R. 3.6 (1984)
Arkansas	Arkansas Rules of Professional Conduct, Rule 3.6 (1985)
California	No Trial Publicity Provision
Colorado	Colorado Code of Professional Responsibility, D.R. 7-107 (1970)
Connecticut	Connecticut Rules of Professional Conduct, Rule 3.6 (1986)
Delaware	The Delaware Lawyers' Rules of Professional Conduct, Rule 3.6 (1985)
District of Columbia	Rules of Professional Conduct, Rule 3.6 (1990)
Florida	Florida Rules of Professional Conduct, Rule 4-3.6 (1986)
Georgia	Georgia Code of Professional Responsibility, D.R. 7-107 (1984)
Hawaii	Hawaii Code of Professional Responsibility, D.R. 7-107 (1974)
Idaho	Idaho Rules of Professional Conduct, Rule 3.6 (1986)
Illinois	Illinois Supreme Court Rules of Professional Responsibility, Rule 3.6 (1990)
Indiana	Indiana Supreme Court Rules of Professional Conduct, Rule 3.6 (1986)

State	Provision and Year of Adoption
Iowa	Iowa Code of Professional Responsibility for Lawyers, D.R. 7-107 (1971)
Kansas	Kansas Rules of Professional Conduct, Rule 3.6 (1988)
Kentucky	Kentucky Rules of Professional Conduct, Rule 3.6 (1989)
Louisiana	Rules of Professional Conduct of the Louisiana State Bar Association, Rule 3.6 (1986)
Maine	Maine Code of Professional Responsibility, Rule 3.7(j) (1979)
Maryland	The Maryland Lawyers' Rules of Professional Conduct, Rule 3.6 (1986)
Massachusetts	Canons of Ethics and Disciplinary Rules Regarding the Practice of Law, D.R. 7-107 (1972)
Michigan	Michigan Rules of Professional Conduct, Rule 3.6 (1988)
Minnesota	Minnesota Rules of Professional Conduct, Rule 3.6 (1985)
Mississippi	Mississippi Rules of Professional Conduct, Rule 3.6 (1987)
Missouri	Missouri Rules of Professional Conduct, Rule 3.6 (1985)
Montana	Montana Rules of Professional Conduct, Rule 3.6 (1985)
Nebraska	Nebraska Code of Professional Responsibility, D.R. 7-107 (1970)
Nevada	Nevada Rules of Professional Conduct, Supreme Court Rule 177 (1986)
New Hampshire	New Hampshire Rules of Professional Conduct, Rule 3.6 (1986)

State	Provision and Year of Adoption
New Jersey	New Jersey Rules of Professional Conduct, Rule 3.6 (1984)
New Mexico	New Mexico Rules of Professional Conduct, Rule 3.6 (1986)
New York	The Lawyers Code of Professional Responsibility, D.R. 7-107 (1987)
North Carolina	North Carolina Rules of Professional Conduct, Rule 7.7 (1985)
North Dakota	North Dakota Rules of Professional Conduct, Rule 3.6 (1987)
Ohio	Ohio Code of Professional Responsibility, D.R. 7-107 (1970)
Oklahoma	Oklahoma Rules of Professional Conduct, Rule 3.6 (1988)
Oregon	Oregon Code of Professional Responsibility, D.R. 7-107 (1970)
Pennsylvania	Pennsylvania Rules of Professional Conduct, Rule 3.6 (1987)
Rhode Island	Rhode Island Rules of Professional Conduct, Rule 3.6 (1988)
South Carolina	South Carolina Rules of Professional Conduct, Rule 3.6 (1990)
South Dakota	South Dakota Rules of Professional Conduct, Rule 3.6 (1987)
Tennessee	Tennessee Code of Professional Responsibility, D.R. 7-107 (1975)
Texas	Texas Rules of Professional Conduct, Rule 3.07 (1989)
Utah	Utah Rules of Professional Conduct, Rule 3.6 (1987)
Vermont	Vermont Code of Professional Responsibility, D.R. 7-107 (1970)

State	Provision and Year of Adoption
Virginia	Virginia Code of Professional Responsibility, D.R. 7-106 (1987)
Washington	Washington Rules of Professional Conduct, Rule 3.6 (1985)
West Virginia	West Virginia Rules of Professional Conduct, Rule 3.6 (1988)
Wisconsin	Wisconsin Rules of Professional Conduct, Rule 3.6 (1987)
Wyoming	Rules of Professional Conduct for Attorneys at Law, Rule 3.6 (1986)